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SUPREME COURT

SUPREME COURT OF KENTUCKY
No. 2013-SC-000549

HARROD CONCRETE AND STONE CO. APPELLANT

VS.

Appeal from the Franklin Circuit Court
Action No. 03-CI-1502
Court of Appeals Nos. 2010-CA-001750
and 2010-CA-001801

B. TODD CRUTCHER, ET AL. APPELLEES

BRIEF FOR APPELLANT HARROD CONCRETE AND STONE CO.

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Certificate of Service

The undersigned certifies that a copy of this Brief was served upon the following persons, by first class mail, postage prepaid, on the 11th day of August, 2014: Hon. Thomas D. Wingate, Circuit Judge, Franklin County Courthouse, 218 St. Clair Street, Frankfort, KY 40601, Hon. Samuel P. Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601, and J. Robert Lyons, Jr., Esq., Dinsmore & Shohl LLP, 250 West Main Street, Suite 1400, Lexington, Kentucky 40507. The undersigned certifies that the record on appeal was not removed from the Clerk's office for the preparation of this Brief.

Robert W. Kellerman
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INTRODUCTION

This Appeal involves the proper measure of damages in a trespass case for the removal of underground limestone deposits, when the surface and the use of the property is unaffected and the value of the real estate is not diminished by the removal. It also involves issues of arbitrariness and due process in the assessment of damages, and whether the assessment of punitive measures of damages was inappropriate under the facts of the case.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes that oral argument would be helpful to the Court's consideration of this appeal because there are several crucial facts and issues of law that deserve emphasis and thorough discussion, and because the lower courts departed from established precedent in the measure of both compensatory and punitive damages.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Harrod Concrete owns approximately 500 contiguous acres of land in Franklin County, Kentucky. It has acquired this property in tracts over the years, the last tract having been purchased in 1992. Harrod Concrete, or its predecessors, has been operating an underground limestone quarry on its property in this area since 1958. (David R. Harrod, VR No. 16, 5/12/10, 3:59:20).

The Appellees B. Todd Crutcher (individually, and as trustee of his living trust) and James Donald Crutcher (hereinafter "Crutchers") own unimproved property in rural Franklin County, Kentucky. This property was dissected by Interstate 64 in or about 1960 leaving one tract of approximately 36 acres without legal access. (Todd Crutcher, VR No. 15, 5/11/10, 11:20). It can be accessed only by foot through the land of adjoining property owners or by climbing the fence from the Interstate 64 right-of-way. The Crutchers typically climb the fence. (Todd Crutcher, VR No. 15, 5/11/10, 12:06). This land-locked property had been neglected for the most part by the Crutchers since 1960, except for occasional hunting forays. The Crutcher property is adjacent to the Harrod Concrete property and is at least two to three hundred feet higher in elevation from the surface of the Harrod Concrete property under which the quarry operations are performed. (Todd Crutcher, VR No. 15, 5/11/10, 1:37:30). The Crutcher property has not been mowed or farmed and its fences have not been maintained, except on the side bordering the Interstate and the side opposite from Harrod where the adjoining landowner maintains the fence. (Todd Crutcher, VR No. 15, 5/11/10, 12:07-12:11). It has long been overgrown with trees and brush. (See Trial Exhibits 2-1 to 2-31). The Crutchers had never explored the mining of limestone on their property and admitted that the removal of limestone from under their property was not feasible. (Todd Crutcher, VR No. 15, 5/11/10, 1:36).

Access between the Harrod and the Crutcher properties is physically impossible on one end of the common boundary because of its steepness. Access on the other end can only be by four-wheel drive vehicles and subsequent walking through underbrush. The surface boundary between the properties has been difficult, if not impossible, to locate for several years. (David R. Harrod, VR No. 16 5/12/10, 4:01-4:05).

Harrod Concrete used HMB Professional Engineers, Inc. ("HMB"), or its predecessors, for over 30 years to map the underground workings of Harrod Concrete's limestone mine. A mapping of the underground workings of the mine is required by the United States Mine Safety & Health Administration ("MSHA") for safety reasons. The MSHA regulations require a detailed mapping of the tunnels, shafts and levels of the mine so that rescue workers can navigate the mine in the event of an emergency. HMB describes these particular maps as "plan sheets." (David R. Harrod, VR No. 16, 5/12/10, 4:21).

MSHA does not require operators to obtain a certified survey that depicts property boundaries. (Cecil Banta VR No. 15, 5/11/10, 3:54:30). Therefore the plan sheets did not certify the exact boundaries of Harrod Concrete's property. To the extent that a plan sheet indicates an above-ground property line, the boundaries are approximate only. The plan sheets also indicate some random internal boundary lines, depicting different property tracts owned by Harrod Concrete. (Bailey Dep., p. 56). These, of course, were of no importance to Harrod Concrete, because Harrod Concrete is permitted to and has mined across survey lines that separate its own various tracts.

In approximately 1996, Harrod, knowing that its operations were creeping outward slowly, felt that identifying the approximate location of the property boundaries was advisable. (David R. Harrod, VR No. 16, 5/12/10, 11:37:40). David R. Harrod, President, first asked its engineers, HMB to locate the approximate boundary lines. (David R. Harrod,

VR No. 16, 5/12/10, 11:43 & 2:30). Harrod sought an overlay of the Property Valuation Administrator property maps onto a map of his property, which would not be exact, but which would be adequate since Harrod did not intend to mine any closer than approximately one hundred feet from the boundary and intended to leave a buffer zone. (David R. Harrod, VR No. 16, 5/12/10, 11:38:30 and 2:29:30). Mr. Harrod possessed a general awareness of the property boundaries and had no information that would suggest that operations were closely approaching any property boundary line. (David R. Harrod, VR No.16, 5/12/10, 11:38:30). HMB indicated to Harrod that it would locate the approximate property boundary lines to the extent necessary. In early 2002, Mr. Harrod still believed that Harrod Concrete was a safe distance away from its property line, however Harrod ceased operations in the area in question in or prior to early April, 2002 and moved its operations to another part of the underground quarry.

Harrod had no incentive to mine limestone from the property of others. Harrod Concrete had "reserves of well over one hundred years". David R. Harrod testified that his "grandchildren won't run out of rock". (David R. Harrod, VR No. 16, 5/12/10, 11:32:15 and 4:53:00). In addition, there was a cheaper method of extracting rock by mining deeper into the floor of previously mined areas, as opposed to extending the horizontal reach of the quarry. (David R. Harrod, VR No. 16, 5/12/10, 4:53:10).

Steven Gardner, a mining engineer, who the trial court permitted to testify as the Crutchers' expert witness at trial, directed an underground survey of the Harrod quarry in March, 2002 in another matter unrelated to property boundaries. Gardner, who was not employed by the Crutchers at the time, apparently determined in 2002 that Harrod Concrete's mining operations had at some prior time slightly encroached upon adjoining property, but he did not share that information with Harrod Concrete. Rather, information

was provided to the Department for Surface Mining Reclamation and Enforcement ("DSMRE").

Also, in April of 2002, the survey crew entered into the mine to perform its periodic updating of the MSHA mine map, however, HMB did not deliver a map to Mr. Harrod until December, 2002, after Harrod learned of the possible encroachment onto the Crutchers' property.

On or about November 23, 2002, HMB provided Harrod with a written proposal for a complete mine survey of property boundaries, quoting a price of $80,000.00 (David R. Harrod VR No. 16, 5/12/10, 2:30:50; Defendant's Exhibit 3).

On December 17, 2002, less than one month after Harrod had received the proposal to perform the complete boundary survey, the DSMRE, based on the March, 2002 survey completed by Gardner, asserted that Harrod Concrete had crossed over its boundary and had mined without a permit on the Plaintiffs' property. It issued a citation to Harrod Concrete, which was the first knowledge that Harrod had of a possible encroachment. (David Harrod, VR No.16, 5/12/10, 11:29:30). As soon as Mr. Harrod received this citation, he contacted HMB and asked whether it was possible that Harrod Concrete's mining had encroached across a property boundary line, and if so, onto whose property the encroachment had occurred. (David Harrod, VR No.16, 5/12/10, 11:29:30). Only then did HMB provide Harrod with the map for the April, 2002 underground inspection (Bailey Dep. P. 64) because the surveyor had just been "busy with other things." After a couple of days, the engineers confirmed that it was "possible" that an encroachment had occurred. (David R. Harrod, VR No. 16, 5/12/10, 11:29-11:31). Harrod was still uncertain if an actual encroachment had occurred (David R. Harrod, VR No. 16, 5/12/10, 2:21:00).

Nevertheless, Mr. Harrod immediately contacted the Crutchers and notified them of this problem because if he owed them for the encroachment, he wanted to pay them. (David Harrod, VR No.16, 5/12/10, 11:31). He provided them with a copy of the April, 2002 map that he had received in mid-December, 2002. (Todd Crutcher, VR No. 15, 5/11/10, 11:21). Settlement discussions ensued (admitted at trial as a state of mind exception to KRE 408) with the Crutchers first insisting on access to their landlocked property, which was rejected. (Todd Crutcher, VR No. 15, 5/11/10, 11:41:20). Next, the Crutchers demanded one dollar a ton compensation for the removed limestone, which Harrod rejected as excessive, since the typical royalty was 5 cents per ton. Harrod offered 15 cents per ton, an above market amount, just to resolve the issue. (Todd Crutcher, VR No.15, 5/11/10, 11:42:00 – 11:43:00). The Crutchers also offered to sell their overgrown and land-locked property to Harrod for $500,000.00, which Harrod rejected (the property was later appraised for $27,900.00). Harrod believed that the Crutchers were pressuring Harrod with unreasonable demands in order to gain access to their landlocked property. (David Harrod, VR No.16, 5/12/10, 4:48). The parties were unable to reach agreement on the volume of stone that had been removed, and the Crutchers rejected Harrod's suggestion that an independent engineer determine the amount of the volume. The Crutchers sought to estimate the volume themselves. Following a series of negotiations that became contentious, unreasonable and unproductive, the Crutchers initiated the present litigation.

Property Line Evidence

There is currently little dispute about the location of the property line, because after this dispute arose, Harrod engaged a professional mine engineer to perform a survey of the underground workings. The issue which arose during the 2010 trial was the lack of available information about the exact location of the boundary line prior to 2002, and

whether Harrod possessed sufficient information to have reason to know that it was mining outside its own boundary.

The property line evidence was relevant to whether the encroachment was inadvertent and merely negligent, as Harrod contends, or the result of grossly negligent actions, as the Crutchers contend. The measure of damages and the availability of punitive damages are dependent in part on the evaluation of this evidence.

The property lines in this hilly wooded area are nearly impossible to ascertain. There are no roads or driveways in the area and no improvements. Remnants of barbed wire exist but they are difficult to detect in the brush and it is uncertain whether the location of the barbed wire corresponded with boundary lines. (David R. Harrod, VR No. 16, 5/12/10, 4:01 to 4:05). Todd Crutcher identified the deed where he and his brother Donald obtained the title from his parents in 1987. (Plaintiff's Exhibit 5) That deed transferred to him 62 acres, even though the 62 acre farm had been divided by Interstate 64 twenty-seven years prior to the deed, leaving separate tracts of 36 acres, the subject property and another tract of 18 acres on the other side of Interstate 64. The remainder had been taken in 1960 for the right-of-way. The deed referenced indistinct boundaries and no metes and bounds and referenced only adjoining landowners with no physical monuments. The entire property description set forth in the Crutcher deed is as follows (Record, Exhibit 5):

> That certain tract of land situated in Franklin County, Kentucky, on the west side of Hanley Lane and bounded on the east by said Hanley Lane, on the south by the land of Edmond Power (formerly John Shyrock), on the west by the lands of Charles Wright (formerly William Loehle), and on the north by the land owned by the Ed Shryock heirs, containing 62 acres more or less.

This deed description is virtually useless in determining the exact location of the property boundaries. In fact, Todd Crutcher himself, an engineer, testified that it is

impossible to locate his property boundaries from the deed (VR No. 15, 5/11/10, 12:01). After notification by Harrod in late 2002, Crutcher had to obtain from the Kentucky Highway Department its 1958 era right-of-way map to try to find his property line. (VR No. 15, 5/11/10, 12:02). Crutcher even had doubts about the accuracy of the state's right of way map that he found to be the best available source. (VR No. 15, 5/11/10, 11:30). Crutcher also had to inquire of other property owners whether their property adjoined his in an attempt to locate his property line. (VR No. 15, 5/11/10, 1:33). Despite his difficulty in finding his own property boundaries, Crutcher maintained at trial that Harrod should have easily known where their common boundary line was located.

David Harrod testified, without contradiction, that the maps that he received prior to 2002 on an annual basis did not depict an actual property line because they were not required to do so. (VR No. 16, 5/12/10, 4:38:30). The HMB engineer confirmed this in his deposition testimony, which was read at trial. (Bailey Dep., p. 35, 62-65). Harrod did not know how to determine the physical location of a property line from one of the many metes and bounds line descriptions contained in the various deeds (Plaintiff's Exhibit 6) – it was "gobbledygook to a layman," (VR No. 16, 5/12/10, 4:40:10), as evidenced by the fact that Crutcher, a professional engineer, had to obtain information from several sources, make a couple of trips to the courthouse, and had to manually draw out the boundary line. (VR No. 16, 5/12/10, 4:54). Even then the line would have to be physically located on the wooded and rocky hillside surface and then again three hundred feet underground. Harrod reasonably relied on his engineers, and they did not indicate to him in any of the annual map updates that operations were close to the property line. (VR No. 16, 5/12/10, 4:52). Harrod testified that the encroachment was a mistake. (VR No. 16, 5/12/10, 4:53:30). His testimony was supported by Harrod's employees and the property surveyor.

Tom Bailey, the HMB surveyor responsible for updating the annual plan sheet maps during the time of the encroachment, testified that he supervised the effort in 2002 to map the latest underground advances of the mine, (Dep., p. 8) although he himself never went underground. (Dep. p. 12). Bailey testified that even the surveyors "had no idea where the actual property boundary lines were located. (Dep., p. 34). Any property lines shown on their maps are "approximate." (Dep., p. 35). Bailey tried, at David Harrod's request, to superimpose the property lines from the PVA maps in late 2002, but his efforts resulted in the property lines being inaccurately placed, a fact that David Harrod brought to his attention in early 2003. (Dep., pp. 68-69).

In questioning Bailey, the Crutchers' counsel focused on a line that the engineers had drawn on the most recent 2001 map prior to the encroachment, clearly implying that it was the Crutcher property line. He asked Bailey whether the drawn line was a property line for which Harrod should have known not to go beyond. Bailey responded it was a random traverse line, typically drawn only for reference purposes by land surveyors. (Bailey Dep., p. 56). The traverse line is not a boundary line (Bailey Dep., p. 57). There was no method by which any person could determine the property boundary line by the 2001 map used by Harrod Concrete at the time of the encroachment.

The Crutchers contend that Harrod Concrete was grossly negligent in identifying its underground property boundary line with the Crutchers. The Crutchers have relied on three contentions. First, the Crutchers cite the mapping process, alleging that Harrod Concrete took a casual approach to having its property boundaries identified on an underground map. Harrod, as described above, had its engineers perform annual mapping as required by law, and had just received a proposal in November, 2002 shortly prior to discovery of the encroachment. After Harrod realized in December, 2002 that it had a

problem, it engaged another firm, American Engineers, in 2003 to perform a mine boundary survey. It is crucial to note that mapping the boundaries underground is a huge task. It took an entire year beginning in 2003 to accurately identify the property lines. The responsible surveyor testified that it was a "major undertaking" that involved "mounds and mounds" of documents. (David Johnson, VR No. 15, 5/11/10, 1:56). There is no evidence that Harrod's prior engineer or any regulator advised prior to 2002 that Harrod needed such an extensive and detailed mine survey. American Engineers utilized a new GPS (Global Positioning System) guided method in 2003 and 2004 in order to map the underground workings of the quarry – quite a feat since it still required some manual calculations because GPS works poorly or not at all underground.[1] Furthermore, prior to the 2010 trial, even after the Crutchers' engineer, Mr. Gardner, updated his map, Mr. Harrod testified that Gardner's map, HMB's map and the GPS guided American Engineers map did not match each other, leading Harrod to conclude that none of the maps were precisely accurate, demonstrating that locating underground boundaries remained an inexact science even in 2010. (David Harrod, VR No.16, 5/12/10, 2:42:45).

Second, the Crutchers have asserted that Cecil Banta, Harrod's quarry manager, testified that Harrod had no system in place for tying the underground workings of the mine to the surface boundaries until 2003. What Banta actually said was that Harrod determined its underground mining location through a manually calculated methodology that, although imperfect, was "pretty typical" of that used by most in the mining industry at that time. (Banta, VR No. 15, 5-11-10, 3:56:30). Although the GPS (Global Positioning System) survey mapping method, completed by American Engineers at Harrod's property

[1] Evidence of this 2004 map was admissible under KRE 407 because it demonstrated the lack of feasibility of effective and precisely accurate precautionary measures prior to 2002.

in 2004, had just become available in 2002, the ability to accurately correlate surface boundaries to operations underground was still considered to be "cutting edge."

Third, the Crutchers place great emphasis on the testimony of Harrod Concrete underground laborers that they did not know their location underground in relation to the surface when they performed limestone blasting activities. These workers, James L. Smith and Donald Lewis, were not in management, were not engineers, had no role in determining the direction or location of mining activity, just "did what they were told" and drilled where they were directed. (Smith, VR No. 15, 5/11/10, 4:09:45 and Lewis, VR No. 15, 5/11/10, 4:18). These laborers had no reason to be concerned about underground property boundaries. Furthermore, Glen Stone, the mine foreman at the time the encroachment occurred, testified that Harrod Concrete used maps, "measurement tapes" and a protractor to determine their location underground in relation to approximate surface property boundaries. (Stone, VR No. 15, 5/11/10, 36:10), (Glen Stone, VR No. 15, 5/11/10, 4:25). Stone testified that he thought Harrod Concrete was "well within our boundary," (Stone, VR No. 15, 5/11/10, 4:30:55), that no engineer ever advised them that they were getting close to boundary lines, that they did not think they were getting close to the property lines, and that they did the best job they could, using the methods available at the time. (Stone, VR No. 15, 5/11/10, 4:31:45 to 4:32:20).

The evidence at trial indicated that approximately 174,000 tons had been removed hundreds of feet below the surface of the Crutcher property. Although this sounds like a huge amount, and is certainly substantial, the amount of rock removed involved only a minimal encroachment on western edge of the 36 acre Crutcher Tract (See Trial Exhibit 29, last page). In contrast, the Harrod property consists of five hundred acres, a substantial

part of which has not yet been quarried. Harrod had no motive to intentionally encroach on the Crutchers' property.

Relevant Procedural History

The primary pre-trial dispute, and the fundamental issue in this appeal, involves the proper measure of damages for the encroachment. The Crutchers sought to apply the "coal measure of damages," which permits the recovery of a royalty for the innocent trespass and removal of coal, but allows recovery of the fair market value of the coal for willful trespasses, with no reduction for the costs of production. Ultimately, the trial court correctly decided, based on long standing Kentucky case law, that limestone is not a legally cognizable mineral. Therefore, because limestone is "part of the earth", the court properly decided that the measure of damages should not focus on the limestone, but on damage to the Crutchers' property as a whole. The measure of damages then would be the difference in the fair market value of the property as a whole, before and after the trespass. Order, September 20, 2006 (Record on Appeal, hereinafter "ROA", p. 309, Appendix 5).

At a pretrial conference in 2008, Crutchers' counsel stated that under the trial court's measure of damages and the Defendants' proposed jury instruction (ROA 543), which the court had adopted, Plaintiffs would have no evidence of the value of the property before and after the trespass, and therefore would have no evidence of compensatory damages (VR No. 19, 5/28/08 3:21). The Crutchers' counsel invited the trial court to enter summary judgment against them so that they would not have to undertake the expense of a trial with no hope of recovery under the judge's measure of damages. (VR No. 19, 5/28/08, 3:31). Ultimately, the court invited stipulations and cross motions for summary judgment saying that it would consider the Crutchers' suggestion that summary judgment be entered against them to enable them to take an immediate appeal on the measure of

damages issue (VR No. 19, 5/28/08, 3:33:30). During this discussion, the judge even suggested to the Plaintiffs that they obtain expert testimony that the value of the Crutcher's property was enhanced by its location adjacent to the Harrod mine (VR No. 19, 5/28/08, 3:10-3:15). Counsel definitively stated that Plaintiffs would not introduce such testimony (VR No. 19, 5/28/08 3:35).

The trial court itself made a finding in its June 11, 2008 Order (ROA,. P.553) as follows:

> The Plaintiffs conceded that they would have no proof at trial regarding the difference in the fair market value of the property before and after the alleged trespass. Therefore, under said measure of damages, which was adopted by this Court in its order of September 20, 2006, the Plaintiffs would be unable to prove any compensatory damages.... (emphasis added)

Subsequently, the parties executed and filed a Stipulation Regarding Damages Instruction that stated in relevant part as follows: (ROA, p. 557, Appendix 6).

> 2. Plaintiffs will not present evidence at trial concerning the difference, if any, in the fair market value of the real property before and after the Defendant's alleged trespass.
>
> 3. Under the compensatory damages instruction proposed by the Defendants, which establishes the damages as the difference in the fair market value of the real property before and after the trespass, and which is consistent with the Court's September 29, 2006 Order, the Plaintiffs will have no evidence at trial of compensatory damages.

The Crutchers further implored the trial court to enter a judgment against them so that they could simply appeal the judgment to the Court of Appeals without the necessity of trial, in an attempt to obtain a reversal of the measure of damages ruling. The Plaintiffs stated as follows in their Memorandum Response filed on July 22, 2008: (ROA p. 574)

> If the Court continues to follow the rule set out in its September 20, 2006 Order, even if liability for compensatory and punitive damages is shown at a trial, there will, at best, be only nominal damages. . . If the Court is not going to

> reconsider the measure of damages set out in the September 20, 2006 Order, then a judgment based on the stipulation concerning damages would be appropriate (emphasis added).

The trial court subsequently decided that summary judgment was not appropriate (ROA, 591).

The case came to trial beginning on May 11, 2010. Despite the court's prior ruling that the measure of damages was the fair market value before the encroachment versus fair market value after, the court permitted the Plaintiffs at trial, over Defendant's continuous and repeated objections, to introduce proof of the royalty value of the mined limestone and the fair market value of "shot rock".[2] As stipulated, the Plaintiffs did not introduce any evidence from a real estate appraiser to address the measure of damages that was adopted by the court.

Harrod introduced the expert testimony of Philip Tamplin, a certified real property appraiser. Tamplin testified that the fair market value of the property as a whole, both the surface and subsurface, was $27,900 because of its landlocked location and lack of accessibility (Philip Tamplin, VR No. 16, 5/12/10, 3:37:30). Tamplin testified that the value of the property was the same both before and after the underground removal of limestone, because the removal was 300 feet below the surface and did not affect the appearance or use of the property (VR No. 16, 5/12/10, 3:38:30). Based on this uncontradicted evidence, Harrod argued that the compensatory damages were zero – because there was no difference in the value of the property before and after the encroachment.

[2] Shot rock is simply unprocessed limestone that has been mined by blasting. Before sale limestone is generally processed in a rock crusher into different sizes needed for different tasks, such as concrete aggregate, highway subsurface or other needs. Shot rock fragments are irregular in size and is simply fragmented limestone. It has little use.

Following the close of proof, over defendant's objection, the trial court changed its jury instruction on the measure of damages, which had been first discussed at the May 28, 2008 pretrial and relied upon by the parties since that time. The trial court then amended the jury instruction to permit it to "consider the royalty value" of limestone (see Opinion, p. 9, n. 4). Harrod objected since the royalty value was inconsistent with the measurement of the fair market value of the property as a whole before and after the trespass. Harrod's proposed jury instruction did not include the reference to royalty (ROA, 543). The trial court's jury instruction stated (See Supplementary ROA)[3] that the measure was the fair market value before versus fair market value after, but it incongruously told the jury they could "consider" the royalty value, although no guidance was given as to how the royalty related to the fair market value of the property as a whole. In addition, the jury had been continuously exposed during the trial to the concept of the sales price of unprocessed limestone shot rock ($5.50 a ton), which was improperly admitted into evidence. The jury was clearly focused on this information, since its punitive damages award was calculated on the market value of the stone ($5.50 x $174,000 tons = $902,000.00). The trial court entered judgment on June 2, 2010 (ROA, p.626, Appendix 3). On Motion of Harrod, the trial court reduced the punitive damages award to $144,000.00 based on due process concerns (ROA, p. 715 Appendix 4).

The issues on appeal are preserved for review in Harrod's Motions in Limine (ROA p. 289), the May 28, 2008 hearing (VR No. 19, 5/28/08), the April 22, 2010 hearing (VR No. 15, 4/22/08), motions for directed verdict made at the close of Plaintiffs' evidence and

[3] The trial court's jury instructions had not been included in the initial Record on Appeal. The Circuit Clerk was unable to locate the jury instructions. Therefore, the parties have stipulated and agreed to a Supplementary Record on Appeal that includes the jury instructions.

at the close of all proof, and in Harrod's Motion to Alter and or Vacate Judgment or in the Alternative for a New Trial (ROA, 631).

The Court of Appeals Opinion (Appendix 1) agreed that the irregularities in the verdict required reversal. It rejected the trial court's measure of damages. The Opinion also found that Harrod was a "willful trespasser" (Opinion, p. 2), committed a trespass with "reckless disregard" (Opinion, p. 11) and that Harrod committed an "intentional trespass" (Opinion, p. 12). The Court left "intact" the jury's finding that Harrod's actions constituted intentional trespass – even though the jury was never asked to make such a finding. The Court of Appeals remanded the case for re-trial, directing that the measure of damages be based on the market value of the removed limestone, without deduction for Harrod's costs of mining or production – basically adopting for limestone the measure of damages in "coal" cases for intentional trespass. In addition to this inherently punitive measure of damages, assessed only in coal cases where there are instances of willful trespass, the Court of Appeals directed that punitive damages also be considered by the jury. The effect of the Opinion is that it authorizes the imposition of a punitive award twice. Harrod filed a Petition for Rehearing, which was denied (Appendix 2).

ARGUMENT

1. The Court of Appeals Erred in Modifying the Measure of Damages that was Properly Established by the Trial Court's September, 2006 Order

The measure of damages issue was preserved below. See the Additional Authority Presented by Defendant With Regard to Damages Issue, filed April 11, 2006 (ROA, p. 185) and Harrod Concrete's Response to Plaintiffs' Motions in Limine and Harrod's Memorandum Regarding Damages, filed September 8, 2006 (ROA, p. 255).

The first issue that must be discussed is the measure of damages utilized by the trial court for removal of underground limestone. This measure is set forth in the trial court's

September 20, 2006 Order (ROA, p. 309, Appx. 5), which determined that the Crutchers' damages would be measured by the difference in the fair market value of the real property as a whole before and after the encroachment. As explained below, this was the proper measure of damages, however it was not properly applied at the trial of this action because the Court permitted evidence of royalty value and of fair market value of mined limestone, both of which had no applicability to the measure of damages applied by the Court and apparently misled the jury. Several appeal issues turn on the measure of damages.

The Crutchers' Central Kentucky property is an example of what the court in *Rudd v. Hayden,* 97 S.W.2d 35 (Ky. 1936) has described as "limestone country" . . . " where the land is everywhere underlain with limestone . . ." *Id.* at 36 (quoting *Beury v. Shelton*, 144 S.E. 629, 633 (Va. 1928)).

> In this country it <u>is a part of the soil</u>, and a conveyance that reserves the limestone with the right to remove it would reserve practically everything and grant nothing.

Id. (emphasis added).

A later opinion echoed the holding of the *Rudd* Court that limestone is a part of the soil when it stated that limestone "warrants its consideration as a part of the surface rather than as a part of the mineral estate." *Little v. Carter*, 408 S.W.2d 207, 209 (Ky. App. 1966) (quoting *Atwood v. Rodman*, 355 S.W.2d 206, 212 (Tex. Civ. App. 1962)). *Little* also cites another Texas case, *Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949) for the premise that limestone, sand and gravel are not minerals ". . .unless they are rare and exceptional in character or possess a peculiar property giving them special value. . ."

The trial court's Order (ROA, p. 309) cited *Little v. Carter*, *supra*, *Elkhorn City Land Co. v. Elkhorn City*, 459 S.W.2d 762 (Ky., 1970)[4] and *Rudd v. Hayden*, 97 S.W.2d 35 (Ky., 1936) for the premise that limestone is not legally cognizable as a mineral. Due to limestone's entirely unremarkable nature, and its ubiquitous presence throughout Kentucky, courts have always held that limestone is not a mineral as that word is normally understood when contemplating valuable mineral estates. See *Little v. Carter*, *supra*. The Crutchers seek to equate limestone with other, more valuable, substances - not because of its value to them or other specialized nature, but to artificially inflate their damages.

The limestone at issue in the present dispute is in its natural state. It is solid rock of nearly infinite physical dimensions which is at and near the surface as well as extending downward for hundreds of feet. Limestone in a natural state is a solid underground mass. It must be transformed into smaller pieces by explosive blasting, and then removed and processed in a crusher at great expense into industry recognized standard sizes such as # 1, #57, # 411 or other, in order to have any marketable value.[5] If not processed according to these standards, limestone removed from the ground is nothing more than the worthless scrap rock found in a roadside ditch in a highway cut through a hillside. Unprocessed limestone in a ditch has no value. No one even steals it. Yet the Court of Appeals' Opinion improperly assigns inflated value greatly in excess of the value of the Crutchers' property itself to massive underground blocks of stone that have not even been severed.

Because limestone, unlike coal, has no value in its unprocessed natural state (see *Florman v. MEBCO Ltd. P'ship*, 207 S.W.3d 593 (Ky. App., 2006)[6] (citing *Rudd v.*

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[4] *Elkhorn City Land Co.* held that like limestone, sandy clay loam and sandy shale are not minerals.

[5] Different size and compositions of crushed limestone are utilized for varying uses; for example, different sizes are used for driveway or highway bases, building construction, culvert fill, mixing of concrete, or fabrication of products such as concrete blocks.

[6] *Florman* held that clay, like limestone, is not a mineral.

Hayden, 97 S.W.2d 35 (1936)), the measure of damages cannot be either a royalty or the fair market value of mined and processed limestone. Such measures are only for valuable minerals. Because limestone is unremarkable, ubiquitous and considered to be nothing more than a part of the earth itself, the trial court properly concluded in 2006 that the proper measure of damages should be the traditional measure of damages to real estate – the difference between the fair market value of the property as a whole before and after the incursion. See *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 69 (Ky. 2000).

It has long been law in the Commonwealth that limestone in its unprocessed state has no inherent value to property owners, beyond the value of the real property itself. In reversing the trial court's measure of damages, the Court of Appeals ignored existing law.

SCR 1.030 (8)(a) states that the Court of Appeals is bound by the precedent established by the Kentucky Supreme Court and its predecessor Court. It is similarly well-established that:

> ...the primary purposes of the intermediate appellate tribunal were to afford every litigant the right of an appeal and to correct any errors committed at the trial level. Conversely, it is not our function to establish new rules of law or enunciate changes in Kentucky jurisprudence...

Tucker v. Tri-State Lawn & Garden, Inc., 708 S.W.2d 116, 118 (Ky. App. 1986).

The Court of Appeals seems to have subscribed to the Crutchers' contentions below that they are entitled to recover higher damages under a different measure, wrongly attempting to analogize damages appropriate to the mining of coal to the present situation. The Crutchers cited *Jim Thompson Coal v. Dentzell*, 287 S.W. 548, 549 (Ky. 1926), *Elkhorn-Hazard Coal Co. v. Kentucky River Coal Corporation*, 20 F.2d 67, 71 (6th Cir. 1927). These opinions are not useful in the present discussion because they pertain to coal, an especially unique and valuable commodity. Also cited was *Hughett v. Caldwell County*,

230 S.W.2d 92 (Ky. 1950), a "non-coal" case that applies the "coal rule". It dealt with fluorspar, which like coal - but unlike limestone - was at one time considered to be a valuable mineral for some industrial uses. For this reason, *Hughett* is inapplicable.

Nevertheless, the Court of Appeals in the present case wrote on a "clean slate" (Opinion, p. 2) and simply did away with years of applicable law, justifying its departure from precedent by suggesting that *Little v. Carter*, 408 S.W.2d 207 (Ky. 1966), *Elkhorn City Land Co. v. Elkhorn City*, 459 S.W.2d 762 (Ky. 1970) and *Florman v. MEBCO Ltd. P'ship*, 207 S.W.3d 593 (Ky. Ct. App. 2006) are distinguishable from the present action because they deal with the interpretation of deeds. The Court held that even though those cases expressly agree that limestone, shale, loam and clay have no inherent value, such precedent is of no importance in a trespass case, and therefore value should be assigned in the present case to the limestone. The Court of Appeals manufactured a distinction where there was none, thereby ignoring established precedent and changing Kentucky law.

Harrod submits that no valid distinction exists between those cases and the present action. If limestone has no inherent value to establish a mineral estate for purposes of real estate conveyances, it cannot be said that a different rule of law exists for valuation of limestone for purposes of a trespass action. How can it be said that limestone, clay, loam and shale have no value such that they can be excepted from a conveyance that reserves mineral rights, yet on the other hand limestone has measurable inherent value so that its consumption should be compensated in excess of the real estate value in a trespass case? It must be either one or the other – and the courts have consistently determined that limestone has no value as it exists in the ground. The Court of Appeals, in improperly departing from precedent, provided no reason for the different treatment, other than seeking to justify its distinction primarily on its flawed perception of fairness.

The Court of Appeals also observed in a footnote on p. 13 that limestone has been recognized as a mineral "at least in the scientific sense" when contrasted to animal or vegetable substances. Again, this is an ineffective attempt to support the imagined distinction between the character of limestone in cases involved deeds and the character of limestone in a trespass case. This is the proverbial distinction without a difference- and one that is expressly rejected in *Rudd v. Hayden*, 97 S.W.2d 35, 36 (Ky., 1936). The logical extension of this faulty premise is that every substance that is not animal or vegetable, but is mineral has some compensable value. Such is not the law of the Commonwealth, which has held that common sand, gravel, loam and limestone have no inherent value in their natural and unprocessed state. The proper measure of damages for removal of these items is the diminution in the fair market value of the property as a whole, if any. The Court of Appeals' digression from that cardinal rule of damage valuation is unsupported by any premise of law.

The only possible justification for such a digression from precedent would be if the Crutchers introduced some evidence that limestone in the ground has some inherent value. Crutcher did not present any evidence that the limestone had any value whatsoever in its natural state, much less that it had some special character that gave it value above and beyond ordinary limestone. Crutcher presented no evidence that they intended to quarry limestone from their property at some future date, and they admitted that the property was landlocked and inaccessible from any direction. It is uncontradicted that the underground limestone had absolutely no value or use to the Plaintiffs.

Both the trial court and the Court of Appeals had some difficulty in the application of this established precedent, evidently because both felt to varying degrees that the Crutchers were entitled to some sort of compensation. Even if that is so, it was

unnecessary to change the law regarding limestone or to resort to legal gymnastics to permit a recovery. The Court of Appeals ignored that existing case law already provides for such recovery, if damage is demonstrated. The Crutchers elected not to present evidence that the total value of its property interest was diminished by Harrod's actions. In fact, they stipulated that there was no diminishment of value. This tactical decision was a waiver by the Crutchers of a right to recover damages under existing law.

Moreover, even in the absence of actual damage under the law, the law still provides for an award of nominal damages in trespass cases where no actual damage occurred. *Ellison v. R & B Contr., Inc.*, 32 S.W.3d 66, 71 (Ky. 2000) The Crutchers even acknowledged to the trial court that they most likely would only be entitled to recover nominal damages. See Response (ROA p. 574). The Crutchers did not seek an award of nominal damages. The availability of nominal damages was not acknowledged by the Courts in their efforts to fashion a new theory of recovery that was palatable to them.

If upheld, the Court of Appeals' measure of damages would create an absurd result. It would permit the Plaintiffs to recover hundreds of thousands of dollars, based on the number of tons removed times the market value per ton, even though the total value of the property is only $27,900.00. This permits a windfall that is nothing short of outrageous, which will be discussed in detail below.

In implementing new law, the Court of Appeals exceeded its authority in disregarding years of Kentucky precedent in an attempt to reach an outcome it deemed equitable. The Opinion is an example of entirely *ad hoc* justice that is based on no precedent and constitutes a complete surprise to landowners and quarry operators alike.

For these reasons, this Court should reaffirm the trial court's September 20, 2006 Order as setting forth the proper measure of damages.

2. The Trial Court Committed Reversible Error by allowing Plaintiffs to Introduce Evidence Contrary to Their Prior Stipulation, and the Court of Appeals Should have Held that Harrod Was Entitled to Judgment Based on the Absence of Any Proper Evidence of Compensatory Damages

This issue is preserved for review on appeal by Harrod's Motion to Exclude made during the pretrial conference (VR No. 15, 4/22/10; 10:18:50), in Harrod's Motions for Directed Verdict, (VR No., 16, 5/12/10; 2:58:59, and VR No., 17, 5/13/10; 9:54) and in Harrod's Post-Trial Motions (ROA, p. 631).

Based on the trial court's measure of damages ruling, the only evidence properly admissible at trial was evidence relating to the fair market value of the Crutchers' property as a whole. Recognizing this, the Crutchers agreed to the Stipulation filed on July 8, 2008, in which they stipulated that they "will have no evidence at trial of compensatory damages."[7] They also stipulated that the "Defendant will present evidence at trial that will establish there is no difference in the fair market value of the property before and after the trespass." At trial, the Crutchers did not introduce any evidence with respect to any difference in fair market value before and after the encroachment.

Nevertheless, the Crutchers improperly sought to introduce at trial evidence of compensatory damages in the form of royalty rates for limestone pursuant to agreement and the market value of quarried limestone. Both were contrary to their stipulation that they would not have any evidence of compensatory damages. The trial court permitted this maneuver and changed the rules at the close of evidence by including in the compensatory damages Instruction No. 3 the language, "You may take into consideration the reduction in mineable limestone by applying a royalty value per ton of stone taken by the Defendant in this calculation" (Supplementary Record on Appeal). This constitutes reversible error. It is

[7] The Crutchers reiterated at the April 22, 2010 pretrial that their compensatory damages were only nominal. VR No. 15, 4/22/10; 10:21:35.

contrary to established law that measures damages based on the reduction in the fair market value of the property as a whole. It is also contrary to concepts of fair play, since Harrod Concrete was led to believe for four years prior to trial that the case would be tried on one measure of damages, only to have that measure changed at the close of evidence.

A stipulation as to a sum of damages claimed by a party is binding on that party. *Young v. Porter-Leach Hardware Co.*, 148 S.W.2d 718 (Ky., 1941). A stipulation constitutes a judicial admission by a party and a court is bound thereby. It was reversible error for a court to rule in a manner which is contrary to a stipulation and judicial admission of a party. *Baker v. Reese*, 372 S.W.2d 788 (Ky., 1963). The trial court erred when it permitted the Crutchers to submit compensatory damages evidence in the form of royalty and market value.

Harrod Concrete was prejudiced because the testimony regarding the royalty and market value of processed stone was irrelevant under the measure of damages adopted by the trial court in 2006[8], and served merely to prejudice the jury against Harrod Concrete. This is especially so with respect to market value of the stone, $5.50 per ton, which allowed no credit for the costs of mining or overhead costs. The erroneous admission of such evidence focused the jury on the gross market value of mined limestone, rather than the reduction in value, if any, of the real property. The error, without any credit for the cost of mining or overhead, served only to inflame the jury by allowing it to believe that Harrod had made huge profits from the trespass. Admission of this evidence also unfairly required Harrod to have to respond to the Crutchers' claims, despite their lack of relevance.

[8] In addition to its irrelevance, the expert testimony was also utterly unreliable, as outlined below.

The Stipulation and the September 20, 2006 Order should have been enforced. A Directed Verdict should have been rendered for Harrod. The Court of Appeals declined to address this issue (Opinion, p. 15).

3. The Trial Court Committed Reversible Error by Denying Defendant's Motion for Directed Verdict and by Submitting a Compensatory Damages Instruction to the Jury and the Court of Appeals Should Have Directed Judgment in Favor of Harrod

This issue is preserved for review on appeal in Harrod's Motions for Directed Verdict. (VR No., 16, 5/12/10; 2:58:59, and VR No.,17, 5/13/10; 9:54).

It was improper for the trial court to submit the case to the jury, since there was no evidence of any damage to the Plaintiffs that would allow the jury to award compensatory damages under the trial court's measure of damages. The only evidence in the record regarding the fair market value of the property was the testimony of the appraiser Philip Tamplin, introduced by Harrod Concrete, which established that there was no difference in fair market value before and after the trespass. (VR No., 16, 5/12/10; 3:38:30). As such, Harrod's Motion for Directed Verdict should have been granted and the case should not have been submitted to the jury for decision.

Mr. Tamplin's testimony was bolstered by the Crutchers' testimony. As set forth in the Statement of the Case, the Crutchers conceded that the encroachment, which was at least three hundred feet belowground, did not disturb the surface or interfere in any respect with their use or enjoyment of the property, or their plans for future use of the property.

Furthermore, it was erroneous to include language in the jury instructions that the jury could "consider" the royalty value. The trial court's decision to allow evidence of royalty rates and the sales value of stone, and to instruct the jury to consider royalty value, over Harrod's objections (VR No., 17, 5/13/10; 10:03), combined to overwhelm the jury with inadmissible testimony concerning damages and to distract the jury from the proper

measure of damages. On this issue at least, the Court of Appeals ruled correctly, but it did not conclude that a directed verdict should have been entered in Harrod's favor at trial, as requested by Harrod. Instead it declined to address that issue (Opinion, p. 15).

The only admissible evidence introduced at trial was that there was no reduction in the fair market value of the Crutcher property as a result of Harrod's encroachment.[9] The Crutchers proved no damages under the measure adopted by the trial court, and therefore a verdict in favor of Harrod should have been directed.

4. Even if Plaintiffs Were Entitled to Compensatory Damages, Such Damages Should Have Been Capped at $27,900.00

This issue is preserved for review on appeal during arguments on jury instructions. (VR No., 17, 5/13/10; 10:06:30). Defendant tendered an alternate jury instruction that placed a maximum compensatory damages award of $27,900.00, which instruction was ultimately rejected by the trial court (Supplementary Record on Appeal p. 16).

Without waiving Harrod's argument that no compensatory damages should have been awarded, Harrod argues in the alternative that it was erroneous for the Court to decline to limit the maximum recoverable compensatory damages in the jury instructions to the total fair market value of the Plaintiff's property. Mr. Tamplin testified that such value was $27,900.00, both before and after the encroachment.

After declining Harrod's Motion for a Directed Verdict, the trial court rejected Defendant's request to cap at $27,900.00 the compensatory damages that the jury could have awarded. Even if, despite there having been no diminution in the fair market value of the property, the jury somehow believed and found that Harrod's encroachment onto the

[9] It is irrelevant that the Crutchers could have conceivably presented some testimony that would have established a reduction in fair market value because of the encroachment. Having had the opportunity to do so, they chose not to. A directed verdict in Harrod's favor was compelled by the Crutchers' strategic decision.

Crutchers' property deprived that property of all of its value, the Crutchers' damages could not exceed the total value of the property. As such, the jury should have been instructed that it could not award more than $27,900.00 in compensatory damages. Harrod tendered a jury instruction that requested this limitation (see reference above).

The trial court's refusal to include this limitation in the jury instructions is inconsistent with its own prior holdings in this case. The trial court held in its September 20, 2006 Order that "the amount by which the injury to the property diminishes its total value operates as an upper limit on any damage recovery," citing *Ellison v. R & B Contracting,* 32 S.W.3d 66, 70 (Ky., 2000). The trial court also stated that "in no case, of course, may the amount of recovery exceed the diminution in market value," citing *Burkshire Terrace, Inc. v. Schroerlucke*, 467 S.W.2d 770, 772 (Ky., 1971). The trial court's deviation at trial from this prior statement of law permitted the jury to award $36,000.00 in compensatory damages even though the value of the entire tract, both on the surface and below ground, was only $27,900.00.

In *Elkhorn & Beaver Valley Railway Company v. Martin*, 241 S.W. 344 (Ky. 1922), an award to a property owner for damage resulting from railroad construction was reversed when the jury award for damage to a small portion of the property was $1,300, yet an appraisal demonstrated that the total value of the entire farm was only $1,000.00. While the Court did not directly discuss due process issues, it expressed similar concerns by declaring the verdict to be grossly excessive, stating at p. 346:

> Courts are established for the administration of justice, and should not permit, under any circumstances, an absurd and patently unjust result to be reached through the forms of law. The two little pieces of land did not exceed in the aggregate one-half acre, and even if they each represented the most valuable part of the cultivating land on the place, the amount of the verdict is so absurdly excessive as to be revolting to even the commonest sense of justice.

Accordingly, even if there were sufficient evidence of compensatory damages in violation of the stipulation and the trial court's prior rulings,[10] the compensatory damages must be reduced to $27,900.00. There is no evidence that the property had a value of $36,000, as the jury found. The evident addition by the jury of the presumed royalty value to the total property value ($27,900.00 + $8,100.00) was improper because the royalty was not a proper element to consider when applying the correct measure of damages.

There can be no dispute that "[a] general goal of compensatory damages in tort cases is to put the victim in the same position he would have been prior to the injury or make him whole to the extent that it is possible to measure his injury in terms of money." *Schwartz v. Hasty*, 175 S.W.3d 621, 625 (Ky. Ct. App. 2005). Kentucky courts have held that the recovery for the damage to real property cannot exceed the total value of the property. To hold otherwise would create due process concerns. The Court of Appeals declined to address this issue.

5. Should the Court Reject Established Precedent Pertaining to the Measure of Compensatory Damages, It Should Consider Alternative Measures

Harrod's position with respect to the measure of compensatory damages is clear. However, because of the inclination of both the trial court and Court of Appeals to craft an alternative formula for recovery, Harrod must consider the possibility that this Court may decide to disregard established law and set a new measure of damages for the removal of limestone by a trespasser. If this occurs, there are several factors that must be considered.

First, this Court would have to accept the premise that ordinary limestone is a valuable mineral. There are valid legal and policy reasons that this is not now the law in Kentucky, as has been discussed above. Nevertheless, if the Court decides to declare

[10] As noted above, the jury could not have found any diminution in fair market value from the evidence, because absolutely no such evidence was presented.

limestone to be a valuable mineral, at least one portion of the Court of Appeals' Opinion deserves some close consideration. The Opinion, at p. 15, states that an award of a royalty would have properly been considered if there had been an innocent trespass. A royalty would be the most appropriate remedy. It would be highly improper to award the market price of mined and processed limestone for several reasons. Even adopting the reasoning promoted by the Crutchers and the Court of Appeals, such a measure could only be considered in the event of intent on the part of Harrod. As discussed elsewhere in this brief, a finding of intent on Harrod's part requires logical leaps that are unsupported by any evidence.

There is a second consideration that is fundamental to implementing a new measure of damages. In order to even consider a new measure for the removal of limestone by trespass, there must be some evidence that the value of the property as a whole is enhanced by the presence of ordinary limestone. The record below was devoid of such evidence. In Kentucky, property with mineable coal resources typically has value and sale prices far above that of similar properties with no mineable coal resources. Simply put, much of the property in the Commonwealth with mineable coal resources is either mined, or its mineral rights leased. The same cannot be said of real property with limestone, which exists statewide. If a trespasser removes coal, the value of the real estate is diminished because of the depletion of the coal deposits. This is not the case for depletion of limestone deposits, unless the removal otherwise affects the value of the property overall.

Therein lies the wisdom of the established Kentucky precedent that limestone has no inherent value in the ground and that the proper measure of damages is the difference in the fair market value of the property as a whole. Adoption of the Court of Appeals' measure of damages would improperly imply that every property in Kentucky that has

limestone and could conceivably be quarried necessarily has enhanced value above and beyond that of non–limestone properties, despite a complete lack of evidence that this is the case. Limestone quarries are few and far between, notwithstanding the fact that a large portion of the Commonwealth is composed of limestone that could be accessed. There simply is not the demand for limestone that there is for coal, and thus there is simply not the demand for land with limestone deposits for quarry purposes that there is for land with mineable coal. The Court of Appeals' measure of damages for the market value of mined limestone cannot be sanctioned, even in cases of willful trespass, because few, if any, limestone rich properties are valued for their potential quarry value. In this case, even the Crutchers testified that their inaccessible property cannot practically be used for a quarry.

Consequently, if the Court rejects both the traditional measure of damages to real estate as the proper measure and the award of nominal damages where no actual compensatory damages are proven, at most a royalty would be the appropriate measure of damages for an innocent trespass.

Even if this Court approves a royalty measure of damages, it should still be capped at the total value of the property because of due process concerns, which are discussed elsewhere herein. There must be a limit for two reasons: First, due process will not permit an award of compensatory damages in an amount in excess of the total value of the damaged property. If the property was rendered entirely useless for any reason, or it was taken by eminent domain, the maximum award would be capped at the fair market value of the property. Therefore, the law cannot condone an award of royalties, or an award under any other measure, in excess of the total value of the property. Second, while there is a limit to the size of a coal vein on property, there is no known limit to the amount of limestone on any property – in most cases it is, for all practical purposes, of nearly infinite

dimensions. Adoption of a royalty method of recovery theoretically creates the potential for an award in an unlimited amount, unless a cap is imposed.

If an award of punitive damages should be deemed appropriate in a given fact situation, the punitive damages should be based on the compensatory award of a royalty rate, which would be limited by concerns of arbitrariness and due process constraints according to the dictates of *BMW of North America v. Gore*, 517 U.S. 559 (1996) and *McDonald's Corp. v. Ogborn,* 309 S.W.3d 274 (Ky. App. 2009), discussed below. For example a royalty of 10 cents might conceivably support a maximum punitive damages award of a multiple of that amount, consistent with due process constraints.

6. Both the Trial Court and the Court of Appeals Erred by Concluding that a Punitive Damages Instruction Was Warranted

This error is preserved in Harrod's Motions for Directed Verdict, (VR No., 16, 5/12/10, 2:58:59, and VR No., 17, 5/13/10; 9:54) and Post Trial Motions (ROA, p. 631).

No instruction on punitive damages should have been submitted to the jury. The Crutchers introduced no evidence that the encroachment was intentional. They contend that Harrod was guilty of gross negligence, and cite several supposed facts in support thereof; however, a close examination of the evidence acquits Harrod of any reckless actions and of the aggravating factors set forth in KRS 411.184 (2).

a. Harrod's actions complied with the applicable standard of care.

There was no evidence presented to indicate that Harrod was using anything other than the standard, reasonable, and typical method used by limestone quarries to determine the location of its underground workings at the time the encroachment occurred. In fact, Cecil Banta, Harrod's quarry manager in 2010, who was called as a witness by the Crutchers, testified without contradiction that most quarries at the time used the same method as Harrod to locate their underground boundaries. Although a "cutting edge" GPS

based process was available in 2002,[11] and was commissioned by Harrod in 2003, the Crutchers did not contend or demonstrate that the technology was available at or before the time the encroachment occurred, or even if it was, that Harrod was under a duty to implement the advanced technology.

The Court of Appeals justified the imposition of punitive damages on Harrod's failure to utilize "cutting edge" technology, a contention that the Crutchers did not advance (Opinion, p. 17). The Court of Appeals relied on its own observation that because GPS technology was in existence in 2002, Harrod could be said to have been grossly negligent for failing to use it for mapping purposes. This logic is inconsistent with established law regarding the use of recognized industry practices to establish the standard of care.

The Court of Appeals, substituting its own analysis of the evidence in declaring Harrod's conduct "particularly reprehensible", entirely disregarded evidence that Harrod reasonably employed mapping techniques that were used throughout the industry to attempt to verify its underground location and that those techniques did not indicate that the boundary was being closely approached until December, 2002, after the mining had already ceased in the area, and Harrod had already moved its excavation activities to another area of its property. It must be noted that underground mining is a heavily regulated industry, yet regulations at the time did not require the use of state of the art or cutting edge technology to pinpoint underground locations and boundaries. Harrod did what was required of it by both regulation and industry standards.

[11] It must be remembered that in the years leading up to 2002, satellite based GPS location technology (Global Positioning System) was fairly new and not used widely for any purpose. It was not the ubiquitous presence that it is today. It was also very new to the mapping of underground mining, and remains unperfected even today. In fact it was not even utilized by the Plaintiffs' expert witness, Steve Gardner, a professional engineer, who testified at trial in 2010.

The standard of care in a negligence case may be based on custom and practice in the relevant community. Ordinarily, one is not considered negligent in respect to acts that conform to a common practice that has existed for years. *Ellis v. Louisville & N.R.Co.*, 251 S.W.2d 577, 579 (Ky. 1952). Where a defendant, by uncontroverted evidence, shows affirmatively that the act complained of was performed in accordance with the usual and customary manner of persons engaged in like business, the burden is upon the plaintiff to produce evidence that conforming to such practice or custom constitutes negligence. In the absence of any such, it has been held that plaintiffs have failed to produce sufficient evidence of negligence to make an issue triable. *Barnes v. F.C. Gorrell & Sons*, 177 S.W.2d 395 (Ky. 1943).

Although the present action, being a trespass case, was not tried under traditional negligence standards, a negligence analysis certainly applies to the punitive damages question, since it is based on similar standards of a lack of reasonable care, although to a more egregious degree, as defined by common law and KRS 411.184. The Court of Appeals concluded that the facts of the case conclusively established both reckless and intentional behavior by Harrod Concrete, though the Crutchers introduced no evidence at trial that Harrod Concrete violated any industry standard of monitoring underground mining boundaries. In fact, the Crutchers did not even address the issue of industry standards, nor did they ever even allege that Harrod's encroachment was intentional. As stated above, Harrod introduced uncontradicted testimony that reliance on manual mapping methods was the standard in the industry. Thus, it then "devolved" upon the Crutchers to counter such evidence. The Crutchers failed to do so.

Under a traditional negligence analysis, the Crutchers would have failed to prove negligence on the part of Harrod Concrete. Therefore, it certainly cannot be said that

"gross negligence" was proven by clear and convincing evidence, in view of the fact that Harrod complied with prevailing industry standards in underground mine mapping. If Harrod's actions could not have constituted negligence, they certainly cannot be said to have constituted gross negligence, much less by a clear and convincing standard, compounded by elements of fraud, oppression or malice as required by KRS 411.184(2). The Court of Appeals has simply made some unsubstantiated leaps of logic in concluding that Harrod's failure to lead the industry in utilizing new underground GPS technology justified the imposition of punitive damages.

b. No Evidence Exists to Support the Statutory Prerequisites for the Imposition of Punitive Damages.

There is no legitimate dispute that Harrod had no knowledge of a possible encroachment until December, 2002, months after mining in the area had ceased. Furthermore, Glenn Stone, Harrod's mine foreman in 2002, called as a witness by the Crutchers, testified that Harrod always believed it was within its boundaries. None of Harrod's employees testified that they knew or had reason to suspect that Harrod could have been outside its boundaries. Even so, Harrod had looked into obtaining a complete survey and had obtained a proposal in November, 2002 for such a survey. Harrod's failure to immediately utilize costly new "state of the art" technology did not warrant a punitive damages instruction, particularly when Harrod had no reason to believe that it was closing in on its own boundaries. There is no evidence whatsoever that the GPS method was available prior to April, 2002, when Harrod moved excavation to another portion of his property. Even if it had been available, the boundary map would have taken over a year to complete. Furthermore, Harrod had no knowledge until 2003 that the maps prepared by Harrod Concrete's surveying firm, HMB were inaccurate and incomplete. Harrod

proactively attempted to obtain accurate and current information, rather than willfully or even recklessly failing to do so.

The Crutchers have strived in vain to depict Harrod's actions as within the realm of gross negligence by pointing to "No Trespassing" signs that were placed on the rocky wooded hillside many years ago as an indication of Harrod's knowledge of the boundary line location. There is no evidence, nor could evidence have existed at the time of the encroachment, that the location of the signs above ground in the woods correspond with the boundary line, or even if they did that anyone other than a professional mining engineer could have established a correlation between the location of the signs on the surface and the property boundaries hundreds of feet underground.

It is therefore impossible to conclude, based upon these facts, that Harrod's actions were intentional, grossly negligent, reckless or reprehensible. Harrod did not know, and could not have known, of the risk of encroachment, as even relying on its engineers, it had no reason to suspect that it was near its properly boundary. At most the facts establish that Harrod was guilty of simple negligent, innocent trespass.

c. Case law and statutes require a greatly enhanced level of proof to support a punitive damages instruction, which was not met in the present case.

Even an intentional or reckless act, if proven, does not justify punitive damages absent a finding of fraud, oppression, malice or gross negligence under KRS 411.184. *Young v. Vista Homes,* 243 S.W.3d 352, 367 (Ky. App., 2007) (citing *Banks v. Fritsch*, 39 S.W.3d 474, 480 (Ky. Ct. App., 2001)). It is established that courts should be careful not to categorize ordinary negligence as gross negligence because to do so would effectively eliminate the distinction between the two. Awards of punitive damages should be reserved for truly gross negligence. *Kinney v. Butcher*, 131 S.W.3d 357, 359 (Ky. App., 2004).

The trial court acknowledged after the close of evidence that the Crutchers had not made a case for punitive damages, stating that there has been "little evidence of punitive damages," that there has been "no evidence of malicious intent" by Harrod with respect to the trespass," and that the court could "correct it later" if the jury returned an inappropriate verdict. (VR No. 17, 5/13/10, 9:57– 10:00). Despite this candid observation of the absence of malicious conduct, the trial court permitted the punitive damages instruction to go to the jury anyway. This error ultimately allowed the jury to disregard the proper measure of compensatory damages and render an award of punitive damages wholly inconsistent with the evidence presented and Harrod's relatively low degree of culpability.

The Court of Appeals acknowledged that the trial court judge was unimpressed with the scarcity of evidence justifying punitive damages (Opinion, p. 9) and that he was "shocked" at the jury's award (Opinion, p. 10). Nevertheless, the Court of Appeals wrongly substituted its own perception of the evidence and concluded that Harrod's actions were "particularly reprehensible" because the encroachment and taking were "hidden from view" and "could have been avoided" had Harrod successfully verified its aboveground boundaries and correlated them to its underground mining activities. (Opinion p. 17). A punitive damages instruction requires more than a finding that an event "could have been avoided." Indeed, most damages could be avoided with the benefit of hindsight. For this reason, whether an event could have been avoided is not a recognized criterion for assessment of punitive damages.

Even if evidence of reckless behavior existed, there is no clear and convincing evidence of fraud, oppression, or malice, the factors set forth in KRS 411.184 (2). The trial judge expressed doubt- a factor which in itself should indicate a lack of clear and convincing evidence- but the Court of Appeals did not even discuss these factors. In the

absence of such evidence that comports with the elevated standard of proof, there can be no award of punitive damages.

No less important, a punitive damages award cannot be sustained since no compensatory damages award was warranted by the evidence, and because the Crutchers stipulated that they would have no evidence of compensatory damages. Where there is no claim for which compensatory damages would be appropriate, no punitive damages may be awarded. *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980). The punitive damages award should therefore be set aside in its entirety.

Harrod implores this Court to restore some objectivity and reason to the analysis of the facts in this case. The courts have refused to approve punitive damages in circumstances of conduct much more irresponsible than the present case. In *Reffit v. Hajjar*, 892 S.W.2d 599, 607 (Ky. Ct. App. 1994) the Court of Appeals concluded that the evidence did not support a punitive damages instruction in a medical negligence even when the evidence of ". . . negligence was, in our opinion, overwhelming." In *Miller's Bottled Gas, Inc. v. Borg-Warner Corp.*, 817 F. Supp. 643 (W.D. Ky. 1993) the U.S. District Court concluded in a fraud case that the evidence did not support an award of punitive damages <u>even in an intentional tort case</u> because of the absence of a showing of aggravated circumstances required under KRS 411.184. Judge Heyburn distinguished a finding of fraudulent intent (required to find fraud) from a finding of fraudulent motive (the enhanced requirement necessary for an award of punitive damages). It is this type of reasoned nuance that the Court of Appeals failed to employ in the present case, instead concluding in blunt-edged fashion, without analyzing KRS 411.184 that the failure to know its boundaries with precision equated to punishable conduct.

In the present case, Harrod Concrete ceased mining before anyone, even Harrod, had reason to believe there was a possible boundary encroachment. It is uncontradicted that Harrod believed it was within its boundaries. Harrod's conduct cannot be deemed intentional or reckless conduct by any standard, and Harrod's status as a mere innocent trespasser is incontrovertible based on the record. Neither punitive damages nor a punitive measure of compensatory damages is warranted under the evidence.

d. The Cases Relied Upon by the Court of Appeals are Factually Distinguishable and Inapplicable Here.

Similarly problematic, the Opinion erroneously relied on three opinions with respect to the award of punitive damages that have no significant parallels to the present action. The Court of Appeals relied on *Patterson v. Waldman*, 46 S.W. 17 (Ky. 1898) for the proposition that the actual value of clay and soil improperly removed was a proper measure of damages. See Opinion, p. 14 n.7. That case, however, actually supports Harrod's contention, described elsewhere herein, that such a measure of damages is appropriate only where the removed substance has special value, as the unusual white clay removed in *Patterson* was particularly valuable, unlike the ordinary limestone removed in this case. *Id. at* 18. In fact, the subject clay was valuable to the point that trespassers had for years been coming onto the property of both parties, who were adjoining landowners, for the purpose of stealing the clay. *Id.* This opinion is also noteworthy because the Court of Appeals, then Kentucky's highest Court, found that punitive damages were inappropriate because there was no malice or negligence shown on the part of the trespasser, whose trespass onto the adjoining landowner's property was done by his agents and was unknown to him. *Id.*

The Opinion also relied on *Holliday v. Campbell,* 873 S.W.2d 839 (Ky. App., 1994), which the Opinion describes as "too compelling to ignore" (Opinion, p. 20). In

fact, *Holliday* is far from compelling because its facts bear no resemblance to the present case. The trespasser in *Holliday* knew they were cutting the landowner's trees on her land and did so after having been warned by the landowner - an intentional trespass. In the present case, there is no evidence that Harrod had actual knowledge or notice of its trespass until after the fact, and certainly the Crutchers did not warn Harrod because they did not know of it either.

The Court of Appeals also improperly found *Jim Thompson Coal v. Dentzell*, 287 S.W. 548, 549 (Ky. 1926) to be persuasive (Opinion, p. 14). In addition to the fact that *Jim Thompson Coal* dealt with coal, rather than a non-mineral, there were also factual circumstances that have no parallels to the present case. The *Jim Thompson Coal* opinion relied on facts similar to *Holliday* – that the landowners believed that the operator was mining under their property, and put the operator on notice by requesting that the operator investigate, which it did not do. These are facts that do not exist in the present case. *Jim Thompson Coal* also found compelling that the coal company did not keep up its mining maps or that maps were filed with the governmental inspectors. Such facts do not exist in the present case. It is uncontroverted that Harrod had its maps updated on a regular basis by its engineers. There has never been any insinuation that Harrod's maps have not been timely filed with the regulators. Therefore, each and every fact on which the *Thompson* court relied in affirming the finding of willful trespass is absent in the present action.

It is therefore unfathomable how the Court of Appeals could have found these three cases to be instructive on the issue of punitive damages. Even some of the case authority cited by the Crutchers below supports the contention that there was insufficient evidence to support a punitive damages award. *Lebow v. Cameron*, 394 S.W.2d 773 (Ky., 1965), cited by the Crutchers, is instructive on the concept of innocent versus willful trespass. *Lebow*

actually reversed the trial court's judgment of intentional trespass. In *Lebow*, the trespasser drilled two oil wells, even though it was aware of the claim of the prior leaseholder. Nevertheless, the appellate court found the trespass to be innocent because the driller believed he was right. "A willful trespasser *knows he is wrong*; an innocent trespasser *believes he is right*." *Lebow*, at 776. This is precisely the case here.

Swiss Oil Corp. v Hupp, 69 S.W.2d 1037 (Ky. 1934), also cited by the Crutchers, and *Joyce v. Zachary*, 434 S.W.2d 659, (Ky., 1968) state that trespassers may even retain their "innocent" status despite the filing of lawsuits against them. "We do not accept the proposition that the mere fact that a suit is brought against the trespasser requires that he cease to believe he is right and begin to know that he is wrong." *Joyce,* at 661.

This Court should reverse the Court of Appeals with respect to punitive damages. In the event that this Court does not direct that judgment be entered in Harrod's favor, it should at the least rule that punitive damages were unwarranted, and that if the case is retried that no punitive damages instruction should be given.

7. Although Not an Issue on Appeal, the Trial Court Properly Reduced the Punitive Damages Award

Although the trial court improperly gave a punitive damages instruction to the jury, over Harrod's objection, and overruled Harrod's post-trial motion to set aside the award in its entirety, it at least did properly reduce the award from $902,000.00 to $144,000.00. The Crutchers' Court of Appeals brief gave only passing mention to the ratio of punitive damages to compensatory damages and did not substantively address the due process basis of the trial court's reduction of the punitive damages. Still, a discussion of the trial court's reduction of the award and the related due process issues is warranted for background purposes, and also because due process concerns pervade certain holdings of the Court of Appeals, which are discussed later in this Brief.

The Court of Appeals did not address the reduction, because it set aside the punitive damages verdict in its entirety. The Court of Appeals correctly observed that it was erroneous to award the Crutchers the market value of the limestone as punitive damages (Opinion, p. 20). Although the evidence did not justify a punitive damages instruction or an award in any amount, the trial court's reduction of the jury's punitive damages award was appropriate.

It is well-settled in Kentucky that a verdict is excessive under the evidence if it "cause[s] the mind at first blush to conclude that it was returned under the influence of passion or prejudice on the part of the jury." *Louisville & Nashville Railroad Co. v. Mattingly,* 339 S.W.2d 155, 161 (Ky.1960). Indeed, the trial court's expression of shock at the verdict indicates that this "first-blush" standard required a reduction in the instant case.

The compensatory damages award in this case was $36,000.00. The $902,000.00 in punitive damages awarded by the jury clearly exceeded the due process limits set forth in *BMW of North America v. Gore*, 517 U.S. 559 (1996) and *McDonald's Corp. v. Ogborn,* 309 S.W.3d 274 (Ky. App. 2009). These cases establish that when an award, "can be fairly categorized as 'grossly excessive'...," it will "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW of North America*, 517 U.S. at 568.

In *McDonald's*, the Kentucky Court of Appeals recognized, "the upper limit of what the Supreme Court has deemed constitutionally acceptable under the second guidepost - a punitive damage award equal to four times the compensatory damages." *McDonald's, supra* at 302. The Court of Appeals of Kentucky reduced the $1,000,000.00 punitive damages award to the plaintiff in *McDonald's* to $400,000.00, four times the

compensatory damages award of $100,000.00, stating that this was the "constitutionally acceptable amount." *Id.*

In contrast to the punitive ratio of ten times the compensatory damages figure in *McDonald's*, the jury's punitive damage award in the present case was more than twenty-five times the amount of compensatory damages, which were excessive in their own right given that compensatory damages should have been limited to the difference in fair market value of the Crutchers' property, which was zero; or at an absolute maximum, at the total value of the property, $27,900.

This ratio of more than twenty-five to one was plainly in excess of constitutional due process limits, specifically the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution[12] and Section 2 of the Kentucky Constitution.[13] The trial court correctly reduced the award, even though it should have gone further and set aside the award in its entirety.

8. The Court of Appeals Ruling that the Case Should be Retried on an Intentional Trespass Theory and that Punitive Damages Should Also be Considered Sets the Stage for an Arbitrarily Excessive Award that Violates Due Process limits

This issue first arose at the Court of Appeals level when it remanded the case for consideration of an award for both intentional trespass and punitive damages. The review of a constitutional challenge to an award of punitive damages is *de novo*. *Ragland v.*

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[12] "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law..." U.S.C.A. Const. Amend XIV, Section 1 (emphasis added).

[13] Section 2 of the Kentucky Constitution provides, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." *See also Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997) ("provides that the Commonwealth shall be free of arbitrary state action. With respect to adjudications, whether judicial or administrative, this guarantee is generally understood as a due process provision whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures.").

Estate of Digiuro, 352 S.W.3d 908, 916 (Ky. Ct. App. 2010) (citing *Cooper Industries, infra).*

It has long been the law of the land that, "[t]he Due Process Clause of its own force also prohibits the States from imposing "grossly excessive" punishments on tortfeasors. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434 (U.S. 2001). In recognizing the limits of due process, the United States Supreme Court in *Cooper Industries* acknowledged that:

> Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States.

Id. at 433-434.

While this language is often cited with respect to an award of punitive damages exclusively, it belongs in the instant discussion because the Court of Appeals' willingness to award the Crutchers a double recovery. Specifically, the Court of Appeals' endorsement of a measure of compensatory damages that itself is designed to be punitive, as well as an award of punitive damages, is an affront to the limits of due process. It is certainly "grossly excessive," in that it amounts to punishing a trespasser twice for the same conduct.

Kentucky courts reviewed a similar issue in *King v. Grecco*, 111 S.W.3d 877, 881 (Ky. Ct. App. 2002). That case dealt with the removal of trees from the property of another. In that case, the Court of Appeals found that an award of statutory treble damages precluded the recovery of punitive damages. The court relied on language from an analogous case before the Iowa Supreme Court, providing that, although the plaintiff could have sued in tort rather than under the statute, "it by no means follows plaintiffs may have

punitive damages under the statute and punitive damages under common law. Such a rule would violate the basic prohibition against double recovery." *Id.* (quoting *Johnson v. Tyler*, 277 N.W. 2d 617, 618 (Ia. 1979). The situation here is analogous. The Court of Appeals, improperly finding that Harrod acted intentionally or recklessly, approved a double recovery in favor of the Crutchers. As discussed elsewhere, the Court of Appeals improperly found that Harrod's trespass was intentional and that the proper measure of damages for the removal of limestone was the fair market value of the value of the removed limestone without reduction for the cost of removal. Opinion at 15.

Awarding the market value of removed coal, without deduction for the cost of removal and processing, was designed to serve as a punitive sanction for an intentional or willful trespasser in valuable mineral cases. See *Hughett v. Caldwell County*, 230 S.W.2d 92 (Ky. 1950). The Court of Appeals went on to authorize an additional award of punitive damages for what it seemed "particularly reprehensible" conduct. Opinion at 17. It is inappropriate, and violative of due process, for the Court of Appeals to allow for such a double recovery. While applicable law may permit an award of compensatory damages that is punitive in nature for willful trespass in cases involving valuable minerals, it does not follow that punitive damages can also be recovered. In fact, the opposite must be true in order to comply with the limits of due process, as such double recovery certainly constitutes the gross excess warned of by the Supreme Court.

Harrod contends that the Court of Appeals' adoption of the punitive measure of compensatory damages is improper under the facts of this case and the applicable law; Harrod also contends that an award of punitive damages is unwarranted; however, the Court of Appeals' approval of both is simply wrong.

9. The Court of Appeals Opinion Erroneously Affirms the Purported Finding of Intentional Trespass, Which was Never Made by or Submitted to the Jury

This issue first arose at the Court of Appeals level. As mentioned in the Statement of the Case, the Opinion found that Harrod was a "willful trespasser" and committed an "intentional trespass", and relied on these findings in affirming the award of punitive damages. Elsewhere, the Opinion found that Harrod's actions were "reckless".

The Court of Appeals' finding that, "...jurors properly found Harrod committed an intentional trespass" is simply a misstatement of the jury's findings. The jury was not given an instruction on "willful" or "intentional" trespass, similar to that which appears for coal cases in Palmore, *Kentucky Instructions to Juries, Civil, Fifth Edition*, Par. 32.01. The jury was only asked (1) whether a trespass occurred, and if so, (2) whether the Plaintiffs were damaged. The jury never determined that Harrod's encroachment onto the Crutchers' property was intentional. Nevertheless, the Court of Appeals concluded that the jury made such a finding even though such an instruction that was never given. It was improper for the Court of Appeals to "uphold" a factual finding that was never made. This finding demonstrates the Court of Appeals' willingness in this case to make its own findings of fact, regardless of what the evidence at trial established.

This action was nothing more than the substitution of the appellate court's judgment and findings for that of the jury. The Court of Appeals has no authority to substitute its judgment or to make its own findings of fact. *Commonwealth, Dep't of Highways v. Friend*, 500 S.W.2d 405, 406 (Ky. 1973). This erroneous fact-finding is significant because, as noted above, the Court also erroneously ruled that the coal measure of damages for willful trespass is the correct measure for calculating compensatory damages for removal of limestone. That measure of damages is reliant upon a jury

determination that the trespass was intentional. The prejudice to Harrod is compounded because the Court's determination of intentional trespass has a direct impact on the incorrect measure of damages it chose to apply.

Even if such a logical contortion could be justified because of the punitive damages verdict, the Opinion's finding of willful trespass must still be reversed because the elements of proof for punitive damages under KRS 411.184 and for intentional trespass under case law are different. The punitive damages instruction given in this case requires a finding of "reckless" conduct, rather than willful or intentional conduct; therefore at most, by awarding punitive damages to Crutcher, the jury found that Harrod acted with a reckless disregard for the property of others. The jury instruction did not address "willful" or "intentional" actions, elements that are required by the coal trespass cases cited in the Court of Appeals' Opinion.

The court's Opinion recognizes as much, citing *Hensley v. Paul Miller Ford, Inc.*, 508 S.W. 2d 759, 762 (Ky. 1974) for the premise that an award of punitive damages is not supported merely by a finding of a negligent or even an intentional act but whether it has the "character of outrage." Opinion p. 18. Clearly, a jury's determination under the factors listed in KRS 411.184 requires a different analysis than whether an action, particularly trespass, is intentional.

In equating intentional and reckless conduct, the Court of Appeals relied upon *Sandlin v. Webb*, 240 S.W.2d 69, 70 (Ky. 1951) for the notion that a reckless failure to obtain boundary information is as fatal to a claim to limit recovery as an intentional trespass. But even in *Sandlin*, a coal case, the appellate Court's ultimate holding was that the matter should have been submitted to the jury on the question of whether the trespasser's negligence was of such a character to infer that the trespass was made

knowingly. The jury below never had an opportunity to make any finding on whether Harrod's trespass was willful.

The Court of Appeals Opinion also greatly alters the nature of proof that should be introduced at retrial. Because Harrod presented its case at trial in reliance on the trial court's now reversed premise that damages would be calculated based upon fair market value of the real estate, Harrod's proof was not centered on proving or disproving the market value of limestone- because the market value of the limestone was (and is) irrelevant to the damages suffered by Crutcher. If the Court is going to change the measure of damages and require a retrial, fairness dictates that Harrod be permitted to fully try the case at retrial on the issue of willfulness and the measure of damages that is finally determined to be applicable. Instead, the Opinion requires a prejudicial and piecemeal approach that deprives Harrod of the opportunity to counter evidence that was irrelevant at the first trial.

10. The Trial Court Erroneously Allowed Expert Testimony From Steven Gardner

Harrod Concrete objected both in pretrial motions and at the pretrial conference to the testimony of Steven Gardner, which was erroneously permitted at trial. (ROA p. 289, VR No., 15, 4/22/10; 10:25:35). Harrod's objections to Mr. Gardner's testimony are preserved by the Motion in Limine which was initially heard at the April 22, 2010 pretrial conference. The objections were reiterated at trial (VR No. 16, 5/12/10; 10:11:35).

Mr. Gardner testified at trial about the royalty value and the market value of limestone. As noted above, this testimony was improper because it had nothing to do with any damages suffered by the Crutchers, which are properly measured by the diminution in fair market value of the real property rather than the value of any removed limestone. Admission of this testimony only confused and inflamed the jury, eliciting prejudice

against Harrod. Gardner's testimony did not reasonably assist the trier of fact because it is unrelated to any fact in issue under a proper application of the law. Improper evidence is not deemed admissible simply because it was introduced through an expert witness.

Even if the Court somehow concludes that the evidence of royalty and market value was proper, it still should have been excluded because Gardner was not properly qualified as an expert to testify about processed limestone values. As such, his opinions as to royalty value and market value are of questionable reliability. Gardner is not a market appraiser for mined products, but instead is a mining engineer. Gardner has neither the background nor the experience necessary to offer the kind of expert opinions about which the trial court permitted him to testify. An expert in the commercial marketing of mined products could not be qualified as an expert in mine design, safety and mapping, all functions within the capabilities of a mining engineer. The converse is also true – a mine engineer cannot be qualified to testify about a range of values for royalty rates or the fair market value of a mine product.

The Court of Appeals dismissed Harrod's contentions regarding Gardner's qualifications (Opinion p. 23); however it did not substantively address Harrod's chief complaint about Gardner's testimony – that even if he was an "expert", his analysis was flawed and unreliable. With respect to expert witnesses, Kentucky Rule of Evidence 702 provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

KRE 702.

Mr. Gardner's testimony reflects that his analysis involved no scientific or technical expertise of his own, but rather was an informal telephone survey conducted by his staff to individuals or businesses that he could not identify and for which they kept no records. (VR No. 16, 5/12/10, beg. at 11:11). Gardner admitted that his estimate of the range of royalty value was what he could remember, "off the top of his head at that time" and that the amounts, "depend on who you talk to and when you talk to them." (VR No. 16, 5/12/10, 11:18 to 11:19:05). Gardner was unable to identify who his staff contacted, when they contacted them, or what they said. This is not reliable and obviously impedes any meaningful cross-examination regarding the data. It cannot be verified. Any human being can ask assistants to make telephone calls and then testify without authentication or substantiation about the contents of those hearsay telephone calls.

Gardner's status as a mining engineer did not lend any credence to the unscientific and undocumented telephone survey by his office staff to individuals that Gardner cannot even identify. His methodology was so flawed and incapable of being verified that it should have been excluded.

The testimony did not comply with KRE 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) or *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004), and therefore the courts examining the issue should have excluded the testimony in their role as "gatekeeper," a necessary function acknowledged by the appellate courts.

This issue is of no consequence if this Court directs that judgment be entered in favor of Harrod Concrete, as Harrod requested; however if this case is retried for any reason, this issue is important and should be addressed by the Supreme Court to prevent these same errors from repeating themselves at retrial.

CONCLUSION

It may be appealing to some to seek to justify punitive retribution when it is an industry operator defendant versus individual landowner plaintiff, yet the law requires a more objective and dispassionate assessment of liability and damages. Justice requires an analysis of the evidence free of bias or predisposition. Harrod was deprived of such an analysis by the Court of Appeals which, even acknowledging its inability to review the full record (Opinion, fn. 3), made its own interpretation of the facts that showed a predisposition against Harrod. Instead of the heartless mining industry operator the Court of Appeals makes Harrod out to be, an impartial review of the evidence compellingly indicates that Harrod's actions constituted an inadvertent encroachment that did not even approach the evidentiary thresholds required to consider either a willful trespass instruction or punitive damages award.

Harrod Concrete respectfully requests that this Court reverse the Court of Appeals and dismiss the Judgment against Harrod in its entirety, with instructions to the trial court to dismiss the Complaint.

Respectfully Submitted,

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APPENDIX

1. Court of Appeals Opinion – March 22, 2013
2. Order Denying Petition for Rehearing – July 16, 2013
3. Trial Court Verdict and Judgment – June 2, 2010
4. Opinion and Order – August 27, 2010
5. Order concerning Damages - September 20, 2006
6. Stipulation – July 8, 2008